No. 24076-2-III

80998-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BURT , Et al,. Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,
Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
WALLA WALLA COUNTY

The Honorable Robert Zagelow
05-2-00075-0

REPLY BRIEF OF APPELLANT PARMELEE

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A. INTRODUCTION

Appellant, Mr. Parmelee, raised several issues in his opening brief, including violations of CR 11, and that he was an indispensable party in accordance with CR 19 and his motion to intervene was timely under CR 24. He finally asked for attorneys' fees and costs from Appellee Department of Corrections ("DOC").

Appellee, Department of Corrections filed a response brief, dated November 9, 2006. Appellees, the original plaintiffs in this action, asked to join the brief filed by DOC on November 20, 2006. This reply brief is timely filed.

B. SUMMARY OF THE ARGUMENT

Appellant, Allan Parmelee, hereby responds to DOC's response by first pointing out that the pleading errors by the original plaintiffs included both missing signatures and the use of one of the plaintiffs as a representative for the rest. Furthermore, Mr. Parmelee had neither the documents necessary or the standing to ask the trial court to strike the pleadings. Mr. Parmelee then clearly distinguishes Kreidler on the timeliness issue of his motion to intervene.[1]

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[1] Kreidler v. Eikenberry, 111 Wn.2d 828, 766 P.2d 438 (1989).

Mr. Parmelee then shows that public policy requires the courts to consider the actual positions of the parties when considering the enjoinment action of the Public Records Act ("PRA"), RCW 42.56 et seq. Appellant next shows that he timely raised the mandatory joinder issue in his motion and reply. He further shows that even if he had not, public policy would necessitate hearing this issue on the merits. He finally shows how DOC has argued on behalf of the original plaintiffs and as such, if he prevails on this appeal, is entitled to the appropriate attorney's fees and costs.

C. ARGUMENT

1. The Original Plaintiffs' Pleadings Are Deficient And Mr. Parmelee Never Had Standing To Strike The Pleadings In The Trial Court Below.

The Department of Corrections, taking the side of the Plaintiffs in the original case, has argued that the deficiencies pointed out in Plaintiffs' pleadings in the trial court required a motion to strike. The problems with this assertion are both factual and legal.

Factually speaking, Mr. Parmelee did not have a copy of the amended complaint when he filed his motions on April 7, 2005. As was previously shown, Mr. Parmelee was first informed of the actual case title and cause number when he was sent a copy of the signed permanent

injunction enclosed with the letter by DOC employee Megan Murray, a Public Disclosure Coordinator, on dated March 25, 2005. CP 193. However, Mr. Parmelee did not have a copy of either the original or the amended complaint, necessary to find the errors present in the original pleadings.

Legally, it is totally unrealistic to expect a judge to permit a non-party to make a motion to strike. Thus, DOC's contention that the motion to strike should have been made at the trial level is simply unrealistic.

As for the issues present in this case, it is more than an issue of verification. As Appellant pointed out, there can be no such thing as a pro se representative. Thus, it is the continual violation of the court rules which requires various plaintiffs to be struck.

2. Appellant Allan Parmelee's Motion To Intervene Was Timely And Kriedler Is Distinguishable On Its Facts.

Appellee DOC argues that the timeliness argument of Kreidler must be applied to this case. Kreidler v. Eikenberry, 111 Wn.2d at 832. Nothing could be further than the truth. Examination of the facts of *Kreidler* versus this case highlight the tremendous differences which distinguish Kreidler.

First, Kreidler involved a dispute over the title of a ballot initiative. The proponents of the initiative appealed the title to Thurston County Superior Court. This appeal was served on the Secretary of State, the Attorney General, the Clerk of the House of Representatives and the Secretary of the Senate. Id. at 831. The record also states that the chairman of the competing ballot measure, approved by the Washington legislature, was aware of this appeal. Id. After hearing from the litigants, the trial court ordered the litigants to see if they could come up with an agreed title, which they did. Only after an order was entered approving the new title did the committee and several legislators move to intervene. Id.

The Supreme Court, in its examination, critically pointed to the timeliness requirement in the statutory scheme which permitted challenges to ballot titles. As the Krieder court said

> A factor supporting the trial court's ruling is the statute governing ballot titles which emphasizes the importance of timeliness. It allows the Attorney General only 7 days to prepare and file a ballot title, challengers only 5 days to appeal the title, and the superior court only 5 days to render a decision. RCW 29.79.040-.060. Timing is clearly important. There is a strong interest in the finality of ballot title decisions.

Id. at 833. There was no such timeliness requirement here.

It is also important to consider the parties to the intervention. The committee, whose chairman was provided sufficient notice, was one of the intervenors, along with the several legislative members.

Finally, the Kreidler court pointed out that "[t]he Attorney General argued vigorously in favor of his ballot title even though, technically, he did not represent the petitioners' interests." Id. at 833. Contrast that to the situation before this Court.

Mr. Parmelee's interests were not represented at the trial court. The agency fully supported its employees' request for injunctive relief, filing a memorandum in support. CP 12-19.

The Department of Corrections' has also attempted to distinguish Lenzi, claiming there was no duty other than to inform that a complaint and summons were filed. Appellee DOC's Brief at 16; (quoting Lenzi v. Redland Insurance Co., 140 Wn.2d 267, 276, 996 P.2d 603 (2000)). But cherry picking the opinion does not provide the answer. Lenzi further stated in this paragraph that

> Receipt of such pleadings is sufficient to put an alert and concerned party on notice that further proceedings in which it might have an interest may occur, and that in order to protect its interests, the interested party needs to act to assure receipt of subsequent pleadings.

Id.

It is also critical to examine the position taken by Redland – that being provided a summons and complaint, with its court file stamp, was insufficient notice. Redland claimed sufficient notice would require that Redland be informed when the defendant was served. Id. at 275. Needless to say, it was this position the Lenzi court rejected categorically when it wrote the language cited above.

Finally, the Lenzi court took notice of the extensive resources an insurance company can employ, ranging from the informal to the very formal. Id. at 277-78. Contrast that to an individual, incarcerated in the Intensive Management Unit, without court access unless and until he shows the appropriate authorities he is a party to that lawsuit.

3. The Actual Positions Of The Parties Must Be Considered When Determining If The Intent Of The Public Records Act Was Fulfilled During An Enjoinment Proceeding.

The Department of Corrections further makes the claim that the statute permitting enjoinment is silent as to the status of the requestor. Read alone, this is certainly true. But our courts have examined individual statutes within the Public Records Act framework with the intent of the legislature in mind. This intent is stated in RCW 42.56.030:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for

> the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

Furthermore, the agency in question must develop rules and regulations which "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100 (Former RCW 42.17.290). When an agency takes a position supporting the injunction brought by its employees, it defeats the stated purpose of the PRA by allowing the possibility of collusion between the parties to avoid the release of records.

Our courts have continually emphasized the critical importance of open government. See American Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997) ("ACLU") (The purpose of the PRA "is to provide full access to non-exempt public records."); Yacobellis v. City of Bellingham, 64 Wn. App. 295, 301, 825 P.2d 324 (1992) (The "primary purpose is to promote broad disclosure of public records."); Daines v. Spokane County, 111 Wn. App. 342, 347, 44 P.3d 909 (2002) (The purpose of the [PRA] is to keep public officials and institutions accountable to the people."); Progressive Animal

Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994) ("PAWS"). As our Supreme Court stated in PAWS:

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

Id. at 251.

In support of this concept, public policy has been at the forefront of many cases analyzing the tenet of the Public Records Act. See Newman v. King County, 133 Wn.2d 565, 570, 947 P.2d 712 (1997) ("The [PRA] reflects the belief that the public should have full access to information concerning the working of the government."); Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004) ("The [PRA] enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's activities."); ACLU, 95 Wn. App. at 106 ("The public policy behind the act is clearly based on the public's right to the full disclosure of public documents."). Public policy demands that the requestor be an

indispensable party to a PRA injunction for two reasons present in this case.

First, if the agency acts as a neutral party to an injunction, when the agency itself is a party, then the courts are not provided with the necessary adversarial positions required to make an informed decision on the merits. This strikes at the very basis of our legal system.[2] DOC has claimed that "at no time has DOC claimed that any of the records requested by Appellant were exempt from disclosure under the Act." Appellee's brief, p. 22. subsequent to this statement, Appellee stated that"[o]bviously, if DOC believe an exemption applied precluding disclosure, there would be no reason to notify staff so they could seek to enjoin the disclosure." Id. And yet, DOC did not oppose the request, even believing there were no appropriate exemptions to disclosure.

Second, it is also critical to have the requestor be an indispensable part to prevent possible collusion between the agency and its employees to keep records away from the requesting citizen. On the record, it is possible to infer that the original injunction was provided by DOC and possibly modified by the original plaintiffs because the pleading uses legal

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[2]In other contexts, our appellate courts have refused to hear cases if the sides are not properly adversarial. See Everett v. Van Dyke, 18 Wn. App. 704, 705-6, 571 P.2d 945 (1977).

language and the missing footer where the attorney's name and address are usually placed. While it may be understandable that an agency would want to assist its employees to maintain moral, this assistance creates the very problem discussed above, namely the lack of a true adversarial proceeding.

Public policy mandates that the only appropriate solution to the issues raised in this case are to make the requestor an indispensable party under CR 19(a) to an injunction brought under RCW 42.56.540. This then prevents the agency in question from opposing its employees with the attendant moral problems and permits a truly adversarial advocacy which results in the court making a knowledgeable decision.

4. Mr. Parmelee Raised The Joinder Issue In The Court Below, Thus It Is Appropriately Presented For Review.

The Department of Corrections claims that Mr. Parmelee failed to raise the joinder issue in the court below. This assertion is simply factually incorrect. While Mr. Parmelee titled his first motion to the court as one of intervention and joinder, he did more than just title the motion. He stated with particularity within the motion that he had "immediately and timely sought a motion to join and intervene on behalf of the DOC, and/or with the DOC, because it affects his rights in this case." CP 126.

Appellant went on to stay that although the parties knew where he was, they "improperly failed to join [him] as a party . . . " Id. Mr. Parmelee further argued there was no prejudice because of the parties' failure to join him before the final order. CP 126-27. Mr. Parmelee replied to DOC's response, pointing out that he was an indispensable party under CR 19. CP 330.[3]

Joinder is a distinct and separate procedural process from intervention and "resides" in CR 19. The language clearly is not used interchangeably. Mr. Parmelee made it clear in his motion, even without citing the specific civil rule, that he was arguing he was an indispensable party.

It is a traditional rule for courts to interpret pro se pleadings generously. Frost v. Symington, 197 F.3d 348 (9th Cir. 1999) (citing Franklin v. Murphy, 745 F.2d 1221, 1235 (9th Cir. 1984) (a pro se prisoner litigant's pleadings must be construed liberally on a motion for summary judgment)); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988) ("In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford plaintiff the

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[3]The parties opposing Mr. Parmelee's motions had the opportunity to strike the reply brief to his motion if they had felt he was raising an issue for the first time in his reply.

benefit of any doubt."). This conforms with the United States Supreme Courts jurisprudence on this issue. Boag v. MacDougall, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982). See e.g. Sanders v. Ryder, 342 F.3d 991 (9th Cir. 2003) (Washington courts are on notice in a habeas context if a pro se litigant uses the words "ineffective assistance of counsel" in the opening brief and then refers to the federal constitutional issue in the reply brief.) Therefore, this issue was timely and appropriately raised.

Even if the issue wasn't properly raised below, when issues of important public policy are involved, these issues can be considered on appeal for the first time. See Marshall v. Higginson, 62 Wn. App. 212, 218, 813 P.2d 1275 (1991); Maynard Investment Co. v. McCann, 77 Wn.2d 616, 622, 465 P.2d 657 (1970); Peoples Nat'l Bank v. Peterson, 82 Wn.2d 822, 830, 514 P.2d 159 (1973); State v. Card, 48 Wn. App. 781, 741 P.2d 65 (1987). Because the issue of whether or not Mr. Parmelee is an indispensable party in a Public Records Act injunction is a matter of important public policy, this issue must be heard on the merits.

5. Mr. Parmelee Would Be Etitled To Attorney's Fees And Costs From The Department Of Corrections If He Prevails On His Appeal.

The Department of Corrections claims it "is merely the possessor of a record that one party wants and that another does not want released." Appellee's brief, p. 22. However, this statement by DOC is contrary to its very position taken in this brief and this case. If DOC were truly a neutral party then it would not have defended the original plaintiffs who failed to properly verify the amended complaint. If the Department is truly a disinterested bystander, why was a brief filed at all?

It is contended by DOC that Mr. Parmelee was capable of representing his own interests, while incarcerated in the Intensive Management Unit. Surely then, fifteen employees could also protect their interests without the Department's assistance, which they received in spades. These very plaintiffs who, when given the opportunity to file a brief in opposition to Mr. Parmelee's opening brief, joined with the Department in trying to protect their standing in this appeal, besides offering a response to the other issues presented.[4] Based upon these facts,

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[4]Obviously, there was communication between the two parties as evidenced by footnote seven in DOC's response brief. If DOC has strictly limited itself to issues involving the finality of the trial court's decision, it would have not briefed on the signature requirement of CR 11.

there is more than enough evidence, direct and circumstantial, to find that DOC is not a disinterested party.[5]

If DOC was a truly disinterested party and Mr. Parmelee was "trading" briefs with the original plaintiffs, Mr. Parmelee would concede that under Confederated Tribes v. Johnson, 135 Wn.2d 734, 757, 958 P.2d 260 (1998), he would not be entitled to attorney's fees and costs if he prevails. But DOC is truly "sitting at the same table, eating out of the same dish." The point is not that there is an affirmative duty to advocate Mr. Parmelee's position (except of course to provide proper notice which it failed to do) but that it cannot advocate on behalf of its employees because of the conflict it creates with the statutory scheme of the Public Records Act.

Having taken on the duty to argue on behalf of both DOC and the original plaintiffs, the state must be held accountable for its actions. If Mr. Parmelee prevails in this appeal against the Department of Corrections, he must be awarded attorney's fees and costs.

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[5]Appellant Parmelee has filed a motion to strike the motion to join DOC's brief filed November 20, 2006, in violation of RAP 10.2(b). The simple fact that the original plaintiffs filed to timely file a brief shows their reliance on the Department of Corrections to protect their interests.

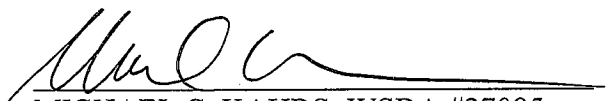
D. CONCLUSION

For the reasons set forth above, appellant Allan Parmelee respectfully asks this Court to reverse the granting of an injunction against the Department of Corrections to release the records and remand this case back to superior court for a hearing on the merits with Allan Parmelee as a party, able to defend his records request. Mr. Parmelee further asks this Court to confirm that Mr. Walters must not represent the other Plaintiffs and that all pleadings filed by Mr. Walters after the amended complaint must be stricken. Finally, Mr. Parmelee asks this Court to order the Department of Corrections to pay all costs of this appeal.

DATED this 11th day of December.

Respectfully submitted,

KAHRS LAW FIRM, P.S.



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